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Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1956

No. ~~710~~ 70

ALBERT L. TROP,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully ask this Court to issue a writ of certiorari to review the final order of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Eastern District of New York dismissing petitioner's complaint in an action for declaratory judgment with regard to petitioner's nationality. The action challenges the constitutionality of Section 401(g) of the Nationality Act of 1940 [now 8 U. S. C. 1481(a)(8)].

(a) The Opinions Below

The opinions of the District Court and of the Court of Appeals have not yet been reported. Copies thereof are hereto annexed (pp. 15-19, *infra*).

(b) Statement of Grounds of Jurisdiction

1. The order of the Court of Appeals was rendered on December 28, 1956 and is final.

2. No application was made for rehearing.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254 (1).

(c) Question Presented for Review

1. May Congress deprive a native born citizen of his nationality solely because he has been convicted of the technical offense of desertion in war time by court martial and, for that reason, dishonorably discharged from the armed forces, absent any contact with the enemy or with any foreign state or intent to make such contact, with the result that loss of American nationality would result in statelessness?

(d) Statute Involved

§ 401(g) of the Nationality Act of 1940 [now 8 U. S. C. 1481(a)(8)].

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> • • •
>
> (8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, nothwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with

such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; * * *."

(e) Statement of the Case

Petitioner is a native born citizen (3a).* While serving in the army in 1944 in French Morocco he was confined in Casablanca for a breach of discipline and escaped from confinement, finding conditions intolerable. He was then 20 years old (4a). Petitioner has not become a foreign national, nor intended to become one, nor did he have any contact with an enemy, nor did he desert to the enemy—he did not even try to reach the Spanish-Moroccan border (4a).

On the basis of those facts court martial proceedings were instituted. One of the charges was "Desertion from May 22 to May 23, 1944" (5a). At his court martial there was no claim that petitioner had deserted to the enemy or attempted to do so. On the contrary, the testimony showed that he surrendered without question to an American officer the day after he escaped (5a). He was convicted on all the charges and dishonorably discharged (3a).

In 1952 petitioner's application for a passport was refused on the ground that he had lost his American nationality (3a). This suit for declaratory judgment was instituted on December 29, 1955 (1a)—thus well within the five years specified in 8 U. S. C. 1503(a) which authorizes the maintenance of actions such as this.

In the District Court both parties moved for summary judgment (1a), both agreeing that no issues of fact existed.

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* The references are to Appellant's Appendix in the Court below.

Judge Inch found that there were no issues of fact, denied petitioner's motion and granted the motion of defendants (6a). His brief memoranda discuss none of the issues of constitutionality raised by petitioner (*infra*, p. 15).

The majority of the Court of Appeals, in an opinion by Judge L. Hand (*infra*, pp. 16-18) also did not discuss those issues, contenting themselves with the statement that there was not sufficient doubt about the constitutionality of the statute to interpret it, as petitioner had asked, as limited to desertions to the enemy. Judge Hand appeared to be of the view that petitioner's chief contention was that he could not lose his nationality without intending to do so, and, to overcome that man of straw, Judge Hand cited *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491; *Revedin* v. *Acheson*, 194 F. 2d 482, cert. den. 344 U. S. 820. As we shall show, those cases are not dispositive of the issue here presented.

In dissent (*infra*, p. 19), Judge Clark expressed the view that loss of nationality under the circumstances here disclosed would constitute cruel and unusual punishment. The majority did not discuss that question, claiming it had not been urged upon them by petitioner.

(f) The Reasons Relied on for the Issuance of the Writ

The Court below has decided an important question of constitutional law which has not been settled by this Court and should be, and it has misconceived the scope and effect of this Court's decisions in *Mackenzie* v. *Hare*, *supra*, and *Savorgnan* v. *United States*, *supra*. Moreover, similar issues are before this Court in *Nishiwaka* v. *Dulles*, No. 415, cert. granted 352 U. S. 907, and *Perez* v. *Brownell*, No. 572, cert. granted 352 U. S. 908.

1. Despite the statement in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703, that the Constitution had not given Congress any express power to take away citizenship, it has been recognized that a citizen can expatriate himself. Since the consent of Congress to such expatriation is necessary laws have been passed declaring that certain acts amount to expatriation. Among these are: service in the armed forces of a foreign state [8 U. S. C. 1481(a)(3)]—an issue involved in *Nishiwaka*; voting in a foreign election [*id.* (5)]), as in *Perez*;* conviction for advocating the overthrow of the government by force [*id.* (10) as amended in 1954]; absence from the country with intent to evade the draft [*id.* (10)], as also in *Perez* [and in *Gonzales* v. *Landon*, 350 U. S. 920, where it was not decided].**

But this Court has never defined the extent of Congressional power in relation to expatriation. It has moved from case to case without having announced principles applicable to the great variety of situations which Congress has declared will result in loss of nationality.

The first case dealing with the problem is *Mackenzie* v. *Hare*, 239 U. S. 299, which held that a native born woman could lose her citizenship by marriage to an alien when at the time of her marriage the law so provided. This Court upheld the law because of the ancient principle of "identity" of husband and wife.

As Mr. Justice McKenna said:

> "* * * and this relation and unity may make it of public concern in many instances to merge their iden-

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* Cf. *Acheson* v. *Kuniyuki*, 189 F. 2d 741, cert. den. 342 U. S. 942; *Acheson* v. *Wohlmuth*, 196 F. 2d 866.

** Cf. *Vidales* v. *Brownell*, 217 F. 2d 136; *Mendoza-Martinez* v. *Mackey*, 238 F. 2d 239.

> tity, and give dominance to the husband. It has purpose if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy * * * " (p. 311).
>
> " * * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected" (p. 312).

The considerations which there led this Court to that conclusion are, of course, wholly absent here.

In *Perkins* v. *Elg*, 307 U. S. 325, where this Court ruled that citizenship could not be lost because of parental action during minority, Chief Justice Hughes stressed that expatriation must result from voluntary action:

> " * * * Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American

citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it."

Later cases decided by this Court have added nothing in elucidation of the problem here present. *Mandoli* v. *Acheson*, 344 U. S. 133, dealt only with dual nationality. This Court rejected the government's claim that American citizenship had been lost by service in the Italian army because that service and the accompanying oath of allegiance had not been voluntary. And it rejected the further claim that citizenship had been lost because of failure to return to the United States upon reaching 21 years because the provision dealing with that subject affected only naturalized citizens. This Court, therefore, did not discuss any questions of Congressional power and the dissenters based their views solely on the fact that an oath of allegiance to Italy had been taken by plaintiff.

Savorgnan v. *United States*, 338 U. S. 491, holds merely that a native born citizen who voluntarily became a citizen in a foreign country had thus expatriated herself, at least when she took up actual residence in the country of her choice. Indeed it is significant to note that the government conceded in that case that the State Department had since 1933 considered actual residence abroad a necessary element of expatriation (*id.* 503).

The *Kawakita* case (343 U. S. 717) presented the problem in reverse. There a person born in this country of Japanese citizens claimed that he had expatriated himself and therefore could not be prosecuted for treason. He based his claim on the fact that under Japanese law he was a Japanese national despite his birth in the United States and that while in Japan after the outbreak of the war he registered in the Japanese Family Census Register, claiming that he thereby renounced his American nationality.

The Trial Court left it to the jury to determine whether or not he had expatriated himself because after the war he held himself out to be an American citizen and claimed that what he had done in Japan was the result of pressure. This Court affirmed the conviction for treason on the ground that the issue whether Kawakita had intended to make a declaration of allegiance to Japan had been properly left to the jury.

Acheson v. *Okimura*, 342 U. S. 899, and *Gonzales* v. *Landon*, 350 U. S. 920, went off on the sufficiency of the evidence. No one of these cases discussed the extent of Congressional power.

But the Court of Appeals for the First Circuit in *Dos Reis* v. *Nicolls*, 161 F. 2d 860, at 862, has expressed doubts about Congressional power. Judge Magruder pointed out (pp. 863, 864) that the Cabinet Committee which had sponsored the 1940 recodification had written to the President: "None of the various provisions in the Code concerning loss of American nationality * * * is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, *show that their real attachment is to the foreign country and not to the United States.*" (Emphasis ours.) The Court, however, so construed the applicable statute as to make it unnecessary to deal directly with the constitutional issue.

In *Okimura* v. *Acheson*, 99 F. Supp. 587, the Court held certain statutory provisions unconstitutional as dealing with situations other than voluntary expatriation. The Court said:

> "It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.

> "The leading case on this subject is United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled.
>
> * * *
>
> "Section 800 of Title 8, United States Code Annotated, deals eloquently with the 'right' of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that 'right' may become a liability.
>
> "Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but is wholly devoid of any power to destroy citizenship by birth" (p. 590).

After this Court remanded the case for further proof, without any discussion of the constitutional issue (*Acheson* v. *Okimura,* 342 U. S. 899), the District Court adhered to the views previously expressed (111 F. Supp. 303)—but since the case was also decided on the facts it was not appealed. In *Terada* v. *Dulles,* 121 F. Supp. 6, the same views were elaborated.

These various opinions suggest the principle that Congress may provide for loss of nationality—or, in another sense, consent to the citizen's surrender of his nationality—in cases where the citizen has, by his own voluntary act, acquired a new nationality or, where dual citizenship exists, chosen to adhere to the other nationality. We submit that this is the extent of Congressional power and that there can be no question of loss of American nationality (and therefore none of consent to such loss) where the proscribed act has no relation to the acquisition of another

nationality. Anything else would be a denial of due process. (*Slochower* v. *Board of Higher Education*, 350 U. S. 551.)

It must be remembered that the Constitution (Amendment 14) states that "All persons born * * * in the United States * * * are citizens of the United States" and that it contains no provision whatsoever giving Congress any power to take that citizenship away. All Congress can do is to consent to a citizen's own intent to expatriate himself. It would be a denial of due process for Congress to declare that certain acts result in loss of citizenship unless those acts are of such a character as, at least, to show an intention to acquire another nationality. Otherwise Congress could, by the device of declaring that conviction for crime results in loss of nationality, add banishment as a penalty for the native born as well as for the alien. This might well be cruel and unusual punishment forbidden by the Eighth Amendment.

One consequence of upholding Congressional power under the circumstances of this case would be that petitioner and others in like case would become stateless persons. Presumably they would be subject to deportation—but no country would accept them. They might be under various disabilities imposed by state legislation—thus such a person could not become a lawyer in many states and might be automatically disbarred if he had previously been one. This aspect of the case has been fully discussed in a Note in the Yale Law Journal entitled The Expatriation Act of 1954 (64 Yale L. J. 1164 at 1189-99). While the note is primarily concerned with loss of nationality arising from conviction under the Smith Act (18 U. S. C. 2383-85), much of what is said there is applicable to the situation here presented. But we cannot subscribe to the author's view (pp. 1185-86) that Congress has power to add expatriation to punishment for crime. Such a view, including as it must

the power to banish a native born citizen, is so foreign to all our concepts that it should not be given judicial sanction.

A view much more in harmony with our institutions was expressed by Professor Roche of Haverford, in The Loss of American Nationality, 99 University of Pennsylvania Law Review 25, at p. 70:

> "The legitimate end of an expatriation statute is to eliminate international problems of nationality by establishing standards by which it can be determined when an American has transferred his allegiance to another sovereign. Ideally speaking, an American should not be deprived of his citizenship until he has obtained that of some foreign state. At the very least, expatriation provisions should not be employed in the gratuitous creation of stateless persons by adding loss of citizenship to the other penalties for crimes against the sovereign."

In other words, having in mind the absence of specific provision in the Constitution for loss of nationality, the requirements of due process of law as guaranteed by the Fifth Amendment and the prohibition against cruel and unusual punishment contained in the Eighth Amendment, Congress may not declare that nationality can be lost except on the basis of some action voluntarily taken which has direct relationship to the acquisition of some other nationality.

2. The Court of Appeals' discussion of the subject of intent is, we submit, a misconception of what was decided by this Court in the cited cases. Those hold only that a person who does acts which result in the acquisition of another nationality may lose his American nationality without having the subjective intent to do so. Such was the case in *Mackenzie*, where the American national, a woman, obtained foreign nationality by marriage. In *Savorgnan*

and *Revedin* the American national affirmatively acquired foreign citizenship and went to live in the foreign country.

In all those cases the question was whether the act performed resulted in loss of nationality despite the claim by the person affected that such loss had not been intended. Since, in each of those cases there actually had been a voluntary expatriation, it of course was irrelevant that it was not understood or intended that American nationality should also be lost. It was quite proper for Congress to declare that dual nationality, under such circumstances, would be contrary to American interests. But here, where there has been no expatriation of any kind, no dual nationality could possibly come into being. There is, therefore, no basis on which Congress can "consent" to an expatriation which has not happened.

The majority of the court below has, accordingly, misunderstood and misapplied this Court's earlier decisions.

3. With regard to the question of cruel and unusual punishment discussed by Judge Clark, we would add only this: The discussion of the subject in the Yale Law Journal to which he refers (and which petitioner cited to the court below) related primarily to loss of nationality for conviction under the Smith Act but it suggested that because of the "inherent uncertainty of the consequences of expatriation" it is a measure of punishment which, if available at all, should be reserved for the most serious of all crimes. Since treason may be punished by death, banishment (which is, of course, what compulsory expatriation might amount to) might be proper punishment for such a crime. Moreover, the very nature of treason is such that it implies allegiance (although not by formal steps) to another government. No such considerations apply here.

4. In any event, the statute should not be held applicable where there was no desertion to the enemy.

Surely the issues here presented are substantial and important. We request, therefore, that certiorari be granted and suggest that the case be set down to be argued with Nos. 415 and 572.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

Opinions of District Court

(Record page 9)

Motion by plaintiff for summary judgment declaring that he has not lost his United States citizenship. Although the papers herein show that there is no genuine issue as to any material fact, they do not show that plaintiff is entitled to a judgment as a matter of law. Therefore, this motion must be and hereby is denied. Settle order.
May 22, 1956.

ROBERT A. INCH,
Chief Judge, U. S. D. C.

(Record page 15)

Motion by defendants for summary judgment dismissing the complaint, wherein plaintiff asks for judgment declaring that he has not lost his United States citizenship.

The papers herein show that there is no genuine issue as to any material fact and that plaintiff has lost his United States citizenship by being convicted by court martial of deserting the U. S. military forces in time of war and, as a result thereof dishonorably discharged from the service of such military forces, the defendants are entitled to a judgment as a matter of law. Therefore, this motion must be and hereby is granted. Settle order.

May 22, 1956.

ROBERT A. INCH,
Chief Judge, U. S. D. C.

Opinions of Court of Appeals

HAND, *Circuit Judge:*

The plaintiff appeals from a judgment, summarily dismissing his complaint in an action under 1503(a) of Title 8, U. S. Code, for a judgment declaring him to be "a national of the United States." He is a native citizen, who was serving in 1944 in the United States Army in French Morocco; and the only question is whether he lost his "nationality" because he was convicted by the judgment of a court-martial of desertion "in time of war." The sentence of the court was that he was "to be dishonorably discharged from the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor * * * for three (3) years." Since the judgment of the district court was summary we are to accept as true the statements in the plaintiff's affidavit upon the motion that he had been imprisoned in Casablanca in May 1944 for an earlier breach of discipline, and found the condition so intolerable that in desperation he escaped. The next day he surrendered; and meanwhile he had made no attempt to leave the area under control of American troops. He had had no intention to "expatriate" himself or to become a national of any other country. Nor did he attempt to have any contact with any enemy of the United States, or to desert to any enemy of the United States, or to any foreign country; and no claim was made in the court-martial proceedings that he had done so.

As will appear, we do not find enough doubt of the constitutionality of the statute to resort to any but the natural meaning of the words: i.e., that "in time of war" desertion of any kind results in "expatriation." Indeed, the proviso for possible restoration of "nationality" makes it impossible to suppose that the crime was confined to desertion to the enemy. It was true that at common law

no subject could throw off his allegiance, and apparently the sovereign could not "expatriate" him. However, the Supreme Court, in *Mackenzie* v. *Hare,* 239 U. S. 299, held that the Act of 1907 (34 Stat. 1228) was valid which "expatriated" a woman who married an alien in this country; and that although she had not intended to surrender her citizenship, and did not suppose that she was doing so. Again, in *Savorgnan* v. *United States,* 338 U. S. 491, a native citizen in 1940 married a citizen of Italy then in this country, and between 1941 and 1945 lived with him in Italy as his wife. She came back to this country on an Italian passport, and the action, like that at bar, was to obtain a judgment recognizing her continued status as a citizen, on the ground that, although she knew that she was being naturalized as an Italian (that being a condition, as her husband told her, of the validity of her marriage), she did not know that she would forfeit her American status, and did not intend to surrender it. Nevertheless the court held that under the Act of 1940 she had done so, because her "place of general abode" between 1941 and 1945 had been Italy (§ 1101(33), Title 8, U. S. C.). See also *Revedin* v. *Acheson,* 194 F. 2d 482 (C. A. 2), certiorari denied 344 U. S. 820.

The important point in both these decisions is, not the especial "objective" facts that the court accepted as the test, but that on both occasions the citizen forfeited her "nationality," not only without supposing that she was doing so, but against her purpose. It is true that the act must not be that of an infant, *Perkins* v. *Elg,* 307 U. S. 325, 334. "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking." We will also assume, *arguendo,* that the same

is true when the act is under duress;* but when it is voluntary and the actor is *sui juris*, it is not necessary that he shall be aware that what he does will "expatriate" him, any more than it is in many other situations where the law imposes liability regardless of the actor's knowledge of the legal effects of his act.

There is still another reason why we may not limit the word "desertion" to desertion to an enemy of the United States. Section 1483(a) of Title 8 provides that, except for subsections 7, 8 and 9, none of the acts mentioned in § 1481 shall result in "expatriation" if they occur within the United States, unless they are followed by a "residence outside the United States." Subdivision 7 provides for a "formal written renunciation," subdivision 9 is for treason and subdivision 8 is the one at bar. Thus Congress provided that "in time of war" desertion within the United States should at once and unconditionally result in "expatriation" if determined by the conviction of a court-martial, and it would be most unreasonable to confine desertions "within the United States" to desertions to an enemy.

We have not considered, and do not consider, whether under the circumstances at bar "expatriation" was, or was not, a "cruel and unusual" punishment under the Eighth Amendment. The plaintiff did not suggest anything of the kind in his complaint, or upon the motion for summary judgment; Judge Inch did not mention it in disposing of the motion, nor did the plaintiff do so in argument. The only part of the brief that by the widest latitude could be considered as so much as a vague intimation of the sort is a passage on page 11; and that did not mention the amendment, but appears to be a part of the general argument that all involuntary expatriation is a denial of "Due Process of Law."

Judgment affirmed.

* * *

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* See *Mandoli* v. *Acheson*, 344 U. S. 133.

CLARK, *Chief Judge* (dissenting):

I am constrained to disagree with both the substance and the procedural form of the result here reached. Plaintiff-appellant has cited to us and obviously relied on the masterful analysis of expatriation legislation set forth in the Comment, *The Expatriation Act of 1954*, 64 Yale L. J. 1164, 1189-1199. I agree with the author's documented conclusions therein that punitive expatriation of persons with no other nationality constitutes cruel and unusual punishment and is invalid as such. Since I doubt if I can add to the persuasive arguments there made, I shall merely incorporate by reference. In my faith, the American concept of man's dignity does not comport with making even those we would punish completely "stateless"—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all.

On procedure I think we are bound as judges to face and decide this issue. It is unfair to the capable and experienced lawyer who presented this appeal to hold that he did not present this argument. For what other possible reason could he have made the specific and exact citation I have given above? His refreshingly brief statement, I conceive, needed no more. But I had supposed that we were bound in any event to do justice and administer the law as between the parties who have come before us.

Judgment of Affirmance

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of December, one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge.
HON. LEARNED HAND,
HON. THOMAS W. SWAN,
Circuit Judges.

ALBERT L. TROP,
Plaintiff-Appellant,

v.

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.